89-1819

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONICA MCCABE,

Petitioner,

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA, DIVISION NO. III

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QUESTION PRESENTED

In petitioner's action to quiet title in herself to her mineral estate, the court below granted summary judgment in favor of respondents based on the validity of a previous judgment quieting title in another. That judgment, however, which purported to pass title by virtue of legal conveyance and prescription and which erroneously described the property, was based upon a tax deed which passed title to the surface estate only, and in fact no adverse possession of the mineral estate was alleged or had occurred. Furthermore, petitioner received no notice of the tax deed proceedings and no notice of the earlier quiet title action, in which she was served only by publication of a notice naming her mother as a possible defendant and which erroneously described the property. The question presented to this Court is:

> Where petitioner had no notice of the tax deed proceeding or earlier quiet title action, and no notice by actual adverse possession, and was denied a hearing on the matter in her own quiet title action, did the action of the court below granting summary judgment to respondents deprive petitioner of her property without due process of law?

LIST OF PARTIES

The parties to the proceedings below included the petitioner Monica McCabe and the respondents Eugene A. Pelizzoni, Edward F. Lewis, Board of County Commissioners, Tulsa County, Oklahoma, and John F. Cantrell, County Treasurer of Tulsa County, State of Oklahoma.

The following defendants in the court below no longer have an interest in the outcome of this case as it pertains to the summary judgment in favor of respondents herein:

W.M. Dunn
Mrs. Winona Wines
Gulf Oil Corporation
A.J. Gieger
Charles Pearce, a/k/a/ Charles L. Pearce
Marilyn M. Pearce
Bonnie K. Gonzales
A.N. Edwards
Pet-Chem, Inc.
Mayabb Drilling, Inc.
P. & L. Energy, Inc.
James E. Barnett
Gerald E. Elliott
Bigheart Pipeline Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MONICA MCCABE, *Petitioner,*

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA, DIVISION NO. III

The petitioner Monica McCabe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Oklahoma, Division III, entered in the above-entitled proceeding on February 28, 1989.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the State of Oklahoma, Division No. III, has not been reported. It is reprinted in the appendix hereto, pp. 1a-7a, *infra*.

The Journal Entry of Judgment of the District Court in and for Tulsa County, State of Oklahoma, has not been reported. It is reprinted in the appendix hereto, pp. 8a-11a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the State of Oklahoma, Division No. III, was entered on February 28, 1989, affirming the trial court's order dated November 14, 1986 granting summary judgment to respondents. The Court of Appeals denied a timely petition for rehearing on April 11, 1989. Thereafter, on February 26, 1990, the Supreme Court of the State of Oklahoma denied certiorari, and this petition for certiorari was filed within 90 days of that date pursuant to 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution

> All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 17, 1965, petitioner Monica McCabe acquired by executor's deed a twenty-acre mineral estate in Tulsa, Oklahoma previously owned by her mother, Monica L. Sharum. The mineral estate had been severed from the surface estate in 1936 when Sharum, then the owner of both estates, conveyed the surface estate only to Devonian Oil Company and a three-quarter interest in the mineral estate

to W.M. Dunn. McCabe acquired the remaining one-quarter mineral interest after Sharum's death in 1959.

In 1937 Devonian Oil Company conveyed by deed the northern fifteen acres of the twenty-acre surface estate to Winona Wines. Wines, however, failed to pay the assessed ad valorem taxes for 1961, and in 1962 the Tulsa County Treasurer sold the tract to Tulsa County in a private sale, subject to a two-year redemption period. In 1963 Charles Pearce obtained the tax certificate to the property by paying the full amount of the taxes due.

Pearce then applied for a certificate tax deed, serving only Wines, the surface owner of the fifteen acres, with notice of his application. Neither Dunn nor Sharum, the mineral estate owners, was served with any notice. On February 6, 1967, Pearce acquired a certificate tax deed to the fifteen-acre tract.

In 1978, Pearce and his wife granted an oil and gas lease to the fifteen-acre tract to respondents Eugene A. Pelizzoni and Edward F. Lewis. Pelizzoni and Lewis did not begin development under the lease, however, until 1981. In 1978, Pearce brought an action in the district court to quiet title in himself to the fifteen-acre tract for which he had obtained the certificate tax deed. Pearce alleged that he derived his title by virtue of this tax deed, which was incorporated into the record by reference, and by prescription from fifteen years of adverse possession by him and his predecessors in title. He made no allegations regarding any actual development of the land for minerals or any taking of minerals, oil or gas.

Pearce served notice of the quiet title action on Sharum as the record owner of one-quarter of the underlying mineral estate by publication, upon Pearce's affidavits that Sharum's whereabouts and last known address were unascertainable. The legal description of the property in the published notice

incorrectly described the property by referencing Section 10 in the metes and bounds portion of the description, whereas the property was actually located in Section 19, as the quarter-section portion of the published description correctly indicated. Sharum was by that time, however, deceased, and the published notice did not reach McCabe, then the owner of the one-quarter mineral estate. On December 4, 1978, the court granted judgment to Pearce quieting title in him to the fifteen-acre tract, decreeing his title perfected by prescription as well as legal conveyance (see pp. 12a-17a, ***infra***). The erroneous legal description was repeated throughout the judgment roll in that action and was used to describe the property in the judgment itself.

More than two years later, beginning in 1981, the land was developed for minerals, and oil was taken from the mineral estate. Upon McCabe's discovery of that fact in 1985, she filed a district court action seeking to quiet title in herself to the severed twenty-acre mineral estate and for an accounting of the converted minerals taken from the fifteen-acre portion of her twenty-acre tract. McCabe moved the court for partial summary judgment, asking the court to declare Pearce's 1967 certificate tax deed to the fifteen-acre tract and Pearce's 1978 quiet title judgment to the fifteen-acre tract void as to McCabe's severed twenty-acre mineral estate on the grounds that: (1) the certificate tax deed was void on its face as to the record owner of the previously severed mineral estate for complete failure of notice; (2) the 1978 quiet title judgment was void on its face as to the record owner of the previously severed mineral estate in that (a) a quiet title judgment based on a void tax deed is itself void because the court is limited in determining the title that a petitioner actually had and cannot go beyond the strength of a petitioner's own title and grant a new title and (b) a quiet title judgment by prescription is void on its face against the record owner of the severed mineral

estate absent specific allegations that the separate mineral estate was actually adversely possessed for the requisite prescription period by the development of the land for minerals and the actual taking of oil and gas and other minerals and (3) the 1978 quiet title judgment was void on its face for lack of in-personam jurisdiction in that the legal description as it appeared throughout the judgment roll including the notice by publication was erroneous and impossible.

When McCabe's motion for partial summary judgment came on for decision, Pelizzoni and Lewis also had a motion for summary judgment pending and the defendants Board of County Commissioners and John F. Cantrell had a motion to dismiss pending. Following oral arguments, the court made a judicial finding that the 1978 quiet title judgment in favor of Pearce to the fifteen-acre tract was not void on its face as to the severed mineral estate and thus overruled McCabe's motion. The court then, on the sole basis of that judicial finding, sustained the pending motions for summary judgment filed by Pelizzoni and Lewis and, overlooking the fact that the judicial finding affected title to only fifteen of McCabe's twenty acres, deemed instanter the Board of County Commissioners' and John F. Cantrell's motion to dismiss as a motion for summary judgment and sustained it also (see pp. 8a-11a, *infra*).

McCabe appealed the district court's decision sustaining both motions for summary judgment and urged the appellate court to reverse the trial court's judgment and remand for a trial of the matter because the court's action deprived McCabe of her property without due process of law. The Court of Appeals for the State of Oklahoma, Division III, however, affirmed the trial court's order, finding merit in McCabe's argument that the tax deed passed title to the surface estate only but also finding that the action before the court constituted a collateral attack on the 1978 quiet title decree. Thus the court

would not consider matters regarding defects of the notice in the tax proceedings which it deemed outside the judgment roll of the 1978 proceedings. The appellate court further found that actual adverse possession of the mineral estate need not be alleged and that Pelizzoni and Lewis' allegation that the defendants in that action claimed some unspecified adverse interest sufficed to vest the trial court with subject matter jurisdiction. Lastly, the court found that the legal description of the subject property was sufficient to enable location and identification of the property, and hence the 1978 judgment was not void on that basis (see pp. 1a-7a, *infra*).

On March 20, 1989, McCabe petitioned the Court of Appeals for rehearing, incorporating the arguments she set forth on appeal and further urging that the deficiencies in the tax deed proceedings were not outside the judgment roll of the 1978 quiet title action, having been fully incorporated into Pearce's petition in that action. Thus, the court could have considered those deficiencies and on that basis found the quiet title judgment void. The court of appeals denied McCabe's petition for rehearing on April 11, 1989 (see pp. 18-19a, *infra*).

McCabe then petitioned the Supreme Court for the State of Oklahoma for a Writ of Certiorari to the Court of Appeals because the latter erroneously limited what is considered part of a judgment roll; failed to follow precedent regarding allegations of actual adverse possession of a severed mineral estate; and decided a question of substance regarding the sufficiency of the legal description in the published notice and throughout the judgment roll of the quiet title action, where such question had not yet been determined by the state supreme court. The state supreme court first granted McCabe's petition for a writ of certiorari on November 13, 1989, but it then recalled that grant and denied certiorari on February 26, 1990 (see pp. 20a-23a, *infra*).

How the Federal Question was Presented

McCabe properly presented the constitutional due process issue in the district court in "Plaintiff's Response to Briefs in Support of Validity of Judgment," wherein she explicitly set forth the provisions of the fifth and fourteenth amendments of the United States Constitution and argued that depriving her of her property under the circumstances of this case violated the notions of due process guaranteed by those amendments (see pp. 33a-37a, *infra*). Furthermore, McCabe wrote a letter to Judge Jane P. Wiseman, who presided over the case in the district court, again specifically referencing the fourteenth amendment and explaining the many ways in which she had been denied the process due (see pp. 26a-30a, *infra*). The district court's journal entry of judgment contained a finding that the court in the original Pearce quiet title action had proper jurisdiction over the parties and the subject matter, and thus the judgment entered therein was not void on its face. However, the court did not explicitly address the constitutional issue (see pp. 8a-11a, *infra*).

In McCabe's Petition in Error relating to the appeal of the district court's decision, she set forth the issues to be raised on appeal, including questions of subject matter jurisdiction and adequacy of notice. Thereafter, in her brief on appeal, she asserted that "[a] judgment to determine title to property, which is beyond the subject matter jurisdiction of a court is void as depriving one of property without due process of law" (citing the fifth and fourteenth amendments to the Constitution of the United States). The Court of Appeals for the State of Oklahoma, Division III, did not address the constitutional issue in its Memorandum Opinion (see pp. 1a-7a, *infra*).

In her Petition for Rehearing in the Court of Appeals, McCabe incorporated by reference and fully adopted the con-

stitutional arguments she raised in the Brief of Appellant and explicitly stated that "[t]he Pearce 1978 quiet title judgment deprived Appellant of property without due process of law in derogation of her constitutional rights" (citing the fifth and fourteenth amendments to the Constitution of the United States). The court's denial of McCabe's Petition for Rehearing is silent as to the reasons therefor (see pp. 18a-19a, *infra*).

McCabe then petitioned the state supreme court for certiorari, alleging therein that errors regarding the lack of in personam and subject matter jurisdiction "resulted in the taking of Appellant's property without due process of law and contrary to the Constitution[s] of . . . the United States of America." The Oklahoma Supreme Court's denial of certiorari is also silent as to the reasons therefor (see pp. 22a-23a, *infra*).

REASONS FOR GRANTING THE WRIT

The Oklahoma Court of Appeals decided an important constitutional question of general application in a heretofore unsettled area which requires the Supreme Court's guidance in order to render an outcome consistent with firmly established principles of due process.

When the court below sustained respondents' motion for summary judgment in petitioner's action to quiet title, finding that the district court properly exercised jurisdiction in the 1978 quiet title action which vested title to petitioner's property in Pearce, it deprived petitioner of property rightfully hers without notice and without an opportunity to explore the matter further at trial. Petitioner had no notice of the tax deed proceeding underlying the 1978 quiet title action which partially served to vest title to petitioner's property in Pearce. Petitioner had no actual notice that possession of her mineral

estate may be in question because there was no actual and notorious adverse possession of the mineral estate until, after the quiet title action, Pearce leased the mineral interest to respondents herein and they began development of the property in 1981. Pearce did not even allege adverse possession of the mineral estate in his petition to quiet title, and yet the court in that action vested title in Pearce by virtue of prescription and legal conveyance, based on the tax deed. The only purported notice to petitioner consisted of a published notice naming Sharum, petitioner's mother, as a possible defendant and incorrectly describing the property as being in Seciton 10, whereas in fact the property is situated in Section 19. Nonetheless, the appellate court affirmed the order of the trial court granting summary judgment to respondents based on the judgment in the earlier quiet title action. The court's decision deprived petitioner of her property without due process of law as guaranteed by the fourteenth amendment to the Constitution of the United States. Thus, the court below decided an important question of a constitutional nature in a heretofore unsettled area which requires this Court's guidance in order to render an outcome in this case and similar cases in accordance with the principles of due process of law as guaranteed by the Constitution and applied by this Court.

The appellate court in this case acknowledged the merit of petitioner's argument that the failure to give notice to a severed mineral estate owner in a tax deed proceeding resulted in passage of title to the surface estate only (see p. 4a, *infra*). *See, e.g., Walker v. Hoffman*, 405 P.2d 57, 62 (Okla. 1965). The court noted further that Oklahoma legislation enacted only one year after Pearce's quiet title action changed the former common-law rule somewhat, providing explicitly that the estate of a tax deed purchaser is limited to that of the previous owner regardless of notice, citing Okla. Stat., tit. 68, § 24323.1 (Supp. 1979) (see p. 4a, *infra*). The court

below, however, found that petitioner's quiet title action constituted a collateral attack on the 1978 decree which upheld the tax deed proceedings, and thus it refused to consider matters which it deemed outside the judgment roll of the 1978 proceedings (see pp. 4a-5a, *infra*). The court ignored the fact that the certificate tax deed was fully incorporated into Pearce's petition by reference, and thus, any insufficiency therein was properly before the court. A recorded instrument such as a deed properly incorporated into the petition by reference becomes part of the judgment roll and subjects the judgment rendered to collateral attack based on the deed. *See Barton v. Alpine Invs., Inc.*, 596 P.2d 532, 535-36 (Okla. 1979) (Opala, J., concurring), *cert. denied*, 444 U.S. 1031 (1980).

The cases relied upon by the appellate court below deal not with void deeds incorported into judgments but with looking outside the judgment roll to ascertain the sufficiency of service by publication when the extrinsic evidence sought to be introduced is not even mentioned on the record. *See Wooten v. Askew*, 668 P.2d 1123, 1125-26 (Okla. 1983); *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713, 716 (Okla. 1968). The appellate court neglected to cite *Mobbs v. City of Lehigh*, 548 P.2d 1048 (Okla. Ct. App. 1976), *reh'g denied* (March 2, 1976), relied upon by petitioner. In *Mobbs*, the court dealt with a quiet title judgment based upon a tax deed issued on municipal property. *Id.* at 1053. The court explained:

> A person may not acquire municipal lands against a municipality on the strength of a tax deed. The 1972 judgment, supra, incorporates the erroneous judgment [based on the tax deed] which further vitiates the judgment. All aspects of a judgment must be taken into consideration when a judgment's validity is attacked.

Id. (citing *Jones v. Jones*, 442 P.2d 319 (Okla. 1968)). In the

instant case, the appellate court acknowledged that a person may not take title to a severed mineral estate without notice to the mineral owner by virtue of a tax deed. Thus the incorporation of the deed purporting to do so into the judgment quieting title in Pearce vitiates that judgment. By refusing to consider the tax deed, the court below made its first error resulting in deprivation of petitioner's property without due process.

The next due process violation in this case occurred in the context of Pearce's claim of adverse possession to petitioner's mineral estate which, coupled with the tax deed that was void as to petitioner formed the basis for quieting title in Pearce in the 1978 action. In that regard, the court below determined that Pearce's general allegation in his petition that petitioner herein claimed some interest in the property adverse to his was sufficient to vest the trial court with subject matter jurisdiction (see pp. 5a-6a, *infra*). In reaching that conclusion, the court below relied on *Crain v. Farmers United Coop. Pool*, 472 P.2d 882 (Okla. 1970), which it read as limiting the earlier case of *Bates v. Old Mac Coal Co.*, 271 P.2d 315 (Okla. 1954) to the particular facts therein. *Bates* held that it was beyond the trial court's jurisdiction to render judgment purporting to quite title in such a way as to enhance the extent of an estate by acquisition of an interest which, on the face of the record, the plaintiffs never owned. *Id.* at 318-19. *See also Churchill v. Muegge*, 323 P.2d 339 (Okla. 1958). The court below erred in failing to apply the principles espoused in *Bates* to the instant case and further ignored that the court in *Crain*, the decision upon which it relied, explicitly stated that "[o]ur holding in the present case is a narrow one." *Crain*, 472 P.2d at 884. *Crain* is distinguishable from the instant case in that the defendant in that case had been personally served, such that the considerations regarding notice inherent in a publica-

tion case were not present. *Id.* Furthermore, the court in *Crain* noted tht "[i]t is expected that the trial bench will conduct a meaningful inquiry into the merits of a quiet title action against named defendants before pronouncing judgment in order that the court may exercise the duty of adjudication rather than the perfunctory process of registration of a judgment." *Id.* It is apparent in the instant case that no such meaningful inquiry occurred because, as the appellate court noted, actual adverse possession of petitioner's mineral estate did not begin until 1981, more than two years after Pearce obtained the judgment quieting title in him (see p. 3a, *infra*).

The case of *Walker v. Hoffman,* is analogous to the instant case. In *Walker,* the court held that:

> Thus, if the owner of severed minerals may be deprived of his mineral estate without notice of the application for certificate deed, and without notice of an adverse claim to the minerals (occupancy of the surface not being notice of an adverse claim to the minerals), it would suggest that due process, for lack of notice, has been denied.

Walker, 405 P.2d at 62 (citations omitted). Petitioner herein, having been deprived of notice as in the *Walker* case, has thus been denied the process due her.

The only way in which petitioner is alleged to have been given notice in this case is by virtue of a published notice in the 1978 quiet title action naming her mother, petitioner's predecessor in interest, as a possible defendant. That notice, however, contained an error in the legal description of the property. The Oklahoma publication statute requires that a proper description of the property in issue be set out in the publication notice. Okla. Stat., tit. 12, § 170.7(4)(1972). Where the published notice does not meet the statutory requirements,

the trial court is without jurisdiction and the judgment is void. *See Barton*, 596 P.2d at 534. The court below, however, found that the property description was sufficient, citing *Gardner v. Jones*, 309 P.2d 731 (Okla. 1957); *Watts v. Meriwether*, 184 Okla. 32, 84 P.2d 643 (1938) (see pp. 6a-7a, *infra*).

Further exacerbating the errors in this case, the erroneous legal description was included in the judgment purporting to quiet title in Pearce. The cases relied upon by the court below deal not with erroneous description in a judgment quieting title, however, but with an assessment roll (*Watts*, 84 P.2d at 647) or notice of tax resale (*Gardner*, 309 P.2d at 735). Judgments present a different situation. In *Newman v. Cornelius*, 3 Cal. App. 3d 279, 83 Cal. Rptr. 435 (1970), the court noted that the rule regarding the sufficiency of legal descriptions in a quiet title action is settled. "Applied to judgments, the rule is that the description in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders the judgment erroneous and void." *Newman*, 3 Cal. App. 3d at 284, 83 Cal. Rptr. at 437 (citing *Newport v. Hatton*, 195 Cal. 132, 156, 231 P. 987, 996 (1924)). The 1978 judgment quieting title in this case wrongly described the property in the metes and bounds portion of the description by referencing Section 10, whereas the property is actually located in Section 19. This error renders the description wrong and impossible, and thus the 1978 judgment quieting title in Pearce is void.

After petitioner became aware of the adverse development of her mineral estate by respondents herein, who had a mineral rights lease from Pearce, she brought her own action to quiet title to the property in her and for an accounting of the removed minerals. Respondents moved for summary judgment on the basis of Pearce's 1978 quiet title judgment, and the court sus-

tained respondent's motion, despite the fact that the 1978 judgment was void on the basis of the erroneous legal description and despite the trial court's lack of jurisdiction to grant title to the severed mineral estate to Pearce. Based on all of the foregoing grounds, the court's action sustaining respondents' motion for summary judgment deprived petitioner of her property without due process of law.

The court below seems to conclude that because Pearce complied with certain prerequisites of the statutory and common law, read broadly, due process was served. This court has acknowledged, however, that "[g]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950) (quoting *McDonald v. Mabee*, 243 U.S. 90, 91 (1917)). The facts in this case clearly evidence a denial of due process.

Although it may be difficult to precisely define due process, this Court has described it as process in accordance with natural, inherent and fundamental principles of justice. *Holden v. Hardy*, 169 U.S. 366, 390 (1898). Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction but with their exercise. *Kinsella v. United States*, 361 U.S. 234, 246 (1960). Due process is not a technical conception with a fixed content unrelated to time, place and circumstances but rather expresses the requirement of fundamental fairness; in applying the due process clause of the fourteenth amendment, one must discover what fundamental fairness consists of in a particular situation. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24-25 (1981).

Under the particular circumstances of this case, the required element of fundamental fairness is grossly lacking. Perhaps

the trial court in the 1978 quiet title action deemed it too time-consuming or burdensome to look into the voidness of the tax deed as to petitioner or the conclusionary allegations of Pearce regarding adverse possession as it pertained to the mineral estate. The Constitution, however, recognizes higher values than speed and efficiency. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

In this case, a series of errors, each one compounded on the one before it, led to an outrageous outcome. The earlier injustices served as the foundation for the later injustices. Surely due process does not conceive of a scenario in which a group of wrongs, bundled together, make a right. Such a result is shocking to a sense of fair play and the conscience of justice.

Severed mineral estates are not uncommon in the oil-producing regions of this country. If the decision of the court below is allowed to stand, it is foreseeable that others will be encouraged to wrongfully deprive mineral estate owners or others of their property by slyly slipping through the cracks of broadly read procedural requirements. Such an outcome is the result of a closer adherence to the fiction rather than the facts of the case and is a clear violation of the notion of fundamental fairness inherent in the due process guaranteed by the fourteenth amendment to the Constitution of the United States.

CONCLUSION

Because this case presents a constitutional question of general application and little guidance on the issue exists, this petition for certiorari should be granted.

Respectfully submitted,

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Tulsa, OK 74105
(918) 742-0232
Counsel for Petitioner

May 21, 1990

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEALS
FOR THE STATE OF OKLAHOMA

DIVISION NO. III

MONICA McCABE,	)	
	)	
APPELLANT,	)	
	)	
vs.	)	No. 67,889
	)	
Board of County Commissioners, Tulsa County, Oklahoma, John F. Cantrell, County Treasurer of Tulsa County, State of Oklahoma, and W.M. Dunn, Mrs. Winona Wines, Gulf Oil Corporation, A.J. Gieger, Charles Pearce, a/k/a Charles L. Pearce, Marilyn M. Pearce, Bonnie K. Gonzales, A.N. Edwards, Pet-Chem, Inc., Mayabb Drilling, Inc., P. & L. Energy, Inc., James E. Barnett, Gerald E. Elliott, and Bigheart Pipeline Corporation, Defendants,	)	
	)	
EUGENE A. PELIZZONI and EDWARD F. LEWIS,	)	
	)	
APPELLEES.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE JANE WISEMAN JUDGE

AFFIRMED

Lawrence D. Taylor,
Tulsa, Oklahoma — For Appellant,

Phillip McGowan,
SANDERS & CARPENTER,
Tulsa, Oklahoma — For Appellees Pelizzoni and Lewis.

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Judge:

Upon consideration of the briefs, exhibits and record in the above styled matter, the Court FINDS that:

1. Appellant seeks review of the Trial Court's order granting summary judgment to Appellees in Appellant's action to quiet title to a mineral interest and for accounting for minerals extracted. In 1936, Appellant's mother, Monica Sharum, conveyed the surface of N/2 NE/4 SE/4 S19-T21N-R13E I.M. to Devonian Oil Co., reserving the minerals. On the same date, Sharum conveyed an undivided three-fourths (¾) mineral interest to Dunn, holding the remaining one-fourth (¼) mineral interest until her death in 1964 or 1965. In 1937, Devonian conveyed its interest in the northern fifteen acres to Defendant Wines. In 1941, Devonian conveyed the southern five acres to Bumgarner.

2. Defendant Wines failed to pay 1961 ad valorem taxes on her northern fifteen acres. In 1962, the 15-acre tract was sold

by the Tulsa County Treasurer, and title taken in the name of the county. In 1963, before expiration of the redemption period, Defendant Charles Pearce obtained a tax certificate covering the fifteen acres. In 1965, Pearce applied for a Certificate Tax Deed, apparently serving actual notice only on Wines. Also in 1965, Appellant Monica McCabe acquired her mother's reserved one-fourth (¼) mineral interest by executor's deed. Pearce obtained his requested Tax Deed in 1967. In 1978, Pearce leased his fifteen acres for oil and gas exploration to Appellees Eugene A. Pelizzoni and Edward F. Lewis.

3. Before development under the lease began, Pearce commenced a quiet-title action covering the fifteen acres, naming Sharum and Dunn as Defendants "claiming some interest," and asserting title to the fifteen acres by virtue of the Tax Deed conveyance and adverse possession. Service of summons and notice of the action was given by publication, but neither Sharum, Dunn nor any representatives thereof appeared or answered. Pearce was found to be the owner of "fee simple title" and judgment quieting title as against "all claims and demands of the defendants" in the fifteen acres was granted to Pearce by virtue of the 1967 Tax Deed and adverse possession. The journal entry of judgment recited that publication notice was appropriate and adequately given. Nothing in the 1978 action (other than the naming of Sharum and Dunn as party-defendants) reflects the previously severed mineral estate.

4. Production from the tract was obtained in 1981. In 1985, and after discovery of production from the tract, Appellant brought the subject action to quiet-title to her one-quarter (¼) mineral interest in the twenty acre tract, and seeking an accounting for her alleged share of production from the twenty-acre tract. Appellant and Appellees each moved for summary

judgment. On hearing of the cross-motions for summary judgment, the Trial Court ruled that the 1978 quite-title judgment was not void or subject to attack, that the 1978 judgment quieting title in Pearce was conclusive of the present action, and granted judgment to Appellees.

5. In her first proposition of error, Appellant challenges the Appellees' predecessor's tax deed as void for failure of Pearce to give notice of his Application for Certificate Tax Deed to the severed mineral interest owners. In support of this allegation, Appellant submits records of the Tulsa County Clerk purporting to show the lack of actual notice of the Certificate Tax Deed application to the severed mineral interest owners.

6. We find nothing in the record indicating oil and/or gas production from the tract until the mid-1980's. Under the law in effect at the time of the issuance of the tax deed, title to all non-producing mineral interests, whether severed or not, passed to the purchaser of the tax deed in fee simple. See, *Christie-Stewart, Inc. v. Paschall,* 502 P.2d 1265 (Okl. 1972); *Walker v. Hoffman,* 405 P.2d 57, 62 (Okl. 1965); *Crane v. Taylor,* 261 P.2d 587 (Okl. 1953). Failure to give notice of the application to severed mineral interest owners could result in the passage of title to the surface only. *Walker v. Hoffman,* 405 P.2d 57, 62. After-enacted legislation changed this rule somewhat so as to limit the estate of the tax deed purchaser to that of the previous owners, regardless of the notice given. 68 O.S. 1979 Supp. §24323.1. At first blush then, and considering the Appellant's evidence of lack of notice to the severed mineral interest owners, it would appear that Appellant's allegation of error is well-taken.

7. However, we find that the present action constitutes a collateral attack on the 1978 decree which specifically upheld the tax deed proceedings. *Bomford v. Socony Mobil Oil Co.,* 440 P.2d 713, 716 (Okl. 1968). Under that circumstance, we

may not consider matters *de hors* the judgment roll of the 1978 proceedings regarding defects of notice of the tax deed proceedings. See, e.g., *Barton v. Alpine Investments, Inc.*, 596 P.2d 532, 535 (Okl. 1979); *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713, 716. Further, we find that the tax deed proceedings are beyond the reach of appellate review, that issue having been conclusively determined in the 1978 quiet-title action. As has been noted:

> We need not pause here to inquire into the validity of the proceedings preceding the issuance of the certificate tax deed. This is admittedly a collateral attack on the [1978] decree. Our inquiry into its validity may not extend beyond an examination of the judgment roll in the action. (Citations omitted.) Unless the record affirmatively discloses want of jurisdiction, every act not negatived on the fact of the judgment roll must be presumed to support a judgment of a court of general jurisdiction. (Citations omitted.) The challenged proceedings which culminated in the issuance of the [1967] tax deed do not appear on the face of the [1978] quiet title action. We cannot here consider their validity.

Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 716.

Under this authority and the circumstances of this case, we may not review the validity of the 1967 Tax Deed and the proceedings therein, those issues having been determined in the 1978 quiet title action. The deficiencies in the tax deed proceedings of which Appellant complains do not appear on the judgment roll of the 1978 quiet title action, and we may not inquire further. We are therefore required to reject Appellant's first allegation of error.

8. Appellant next alleges that the 1978 judgment was void for lack of allegations of adverse possession of the mineral estate

to support assumption of subject matter jurisdiction by the Trial Court. See, *Churchill v. Muegge*, 323 P.2d 339 (Okl. 1958); *Bates v. Old Mac Coal Co.*, 271 P.2d 315 (Okl. 1954). The strict rule of pleading espoused in *Churchill* and *Bates* requiring the specific allegation of fact supporting an adverse possession claim to vest the Trial Court with jurisdiction has, however, been somewhat attenuated. See, *Crain v. Farmer's United Cooperative Pool*, 472 P.2d 882 (Okl. 1970). We read *Crain* as establishing that a quiet-title petition which alleges the statutory requisites under 12 O.S. §1141, as that statute exists at the time of the action, is sufficient to vest the Trial Court with subject matter jurisdiction to render judgment in the matter. *Crain v. Farmer's United Cooperative Pool*, 472 P.2d 882, 884; see also, *Wooten v. Askew*, 668 P.2d 1123, 1125 (Okl. 1983). Ultimately, "[p]rior judgments attacked collaterally must be scrutinized in accordance with the terms of the law in existence at the time of rendition of the judgment." *Wooten v. Askew*, 668 P.2d 1123, 1125.

9. Under this authority and 12 O.S. 1971 §1141, the quiet-title statute in effect in 1978, Pearce was required to plead, in order to vest the Trial Court with subject matter jurisdiction of the quiet-title claim under his tax deed, some unspecified and adverse interest claimed by the defendants. We find that the allegations of Pearce's 1978 petition are sufficient to vest the Trial Court with subject matter jurisdiction in the quiet title action to examine the tax deed title, and the court's orders therefrom are not void.

10. Appellant lastly assails the 1978 judgment as void for use of an erroneous metes and bounds description following an accurate survey description of the property. It is well established that the purpose of the land description "is not to identify the land, but to furnish a means of identification." *Watts v. Meriwether*, 134 Okl. 32, 84 P.2d 643, 647 (1938). Descrip-

tions "will be held sufficient if they are such as to enable the owner and prospective purchasers to identify and locate, with substantial certainty, the land to be sold." *Gardner v. Jones*, 309 P.2d 731 (Okl. 1957); accord, *Chamberlain v. Davis*, 191 Okl. 457, 130 P.2d 848 (1942). Stated another way, "[A] description is sufficient if it 'contains such data as will enable a competent surveyor to locate the property with reasonable certainty either with or without the aid of extrinsic evidence.'" *Watts v. Meriwether*, 84 P.2d 643, 648. Under these authorities, the description of the subject property in the instant suit is sufficient, and the 1978 judgment is not void for the alleged deficiency.

For the foregoing reasons, the order of the Trial Court granting summary judgment to Appellees, based on the prior judgment quieting title to the northern fifteen acres in Appellees' predecessor in interest, is therefore AFFIRMED.

GARRETT, P.J. and REYNOLDS, J. concur.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

MONICA McCABE, Plaintiff,	)	
vs.	)	No. CJ 85-4803
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JOHN F. CANTRELL, Country Treasurer of Tulsa County, State of Oklahoma, and W.M. DUNN, MRS. WINONA WINES, GULF OIL CORPORATION, A.J. GEIGER, CHARLES PEARCE a/k/ CHARLES L. PEARCE, MARILYN M. PEARCE, BONNIE K. GONZALES, A.N. EDWARDS, PET-CHEM, INC., MAYABB DRILLING, INC., P. & L. ENERGY, INC., EUGENE A. PELIZZONI, EDWARD F. LEWIS, JAMES E. BARNETT, GERALD E. ELLIOTT, and BIGHEART PIPELINE CORPORATION, if living, or if all of them are dead, then their unknown heirs, executors, administrators, devisees, trustees and assigns, immediate and remote,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

NOW on this 14th day of November, 1986, this matter comes on now pursuant to plaintiff's Motion for Summary

Judgment, the Motion for Summary Judgment of defendants EDWARD F. LEWIS and EUGENE A. PELIZZONI, and the Motion to Dismiss of defendants BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and John F. Cantrell, County Treasurer of Tulsa County, State of Oklahoma.

The plaintiff appears through her attorneys of record, Pat Malloy and Ronald Bernbaum. The defendants EDWARD F. LEWIS and EUGENE A. PELIZZONI appear through their attorneys of record Philip McGowan and Marilyn Dohnalek. The defendants BOARD OF COUNTY COMISSIONERS, Tulsa County, Oklahoma, and John F. Cantrell, County Treasurer of Tulsa County, State of Oklahoma appear through their attorney of record DORIS FRANSEIN.

Upon reviewing the authorities presented by counsel, and upon considering the arguments of counsel, the Court finds as follows:

That the Court in the Tulsa County District Court case of *Pearce* v. *Board of County Commissioners, et al,* Case #C-78-2116, had proper jurisdiction of the parties and subject matter and the quiet title judgment in favor of Pearce rendered therein is not void on the face of the judgment roll. The Court specifically finds that the subject property was sufficiently described therein.

That plaintiff's Motion for Summary Judgment should be overruled.

That the Motion for Summary Judgment of the defendants EDWARD P. LEWIS and EUGENE A. PELIZZONI should be sustained.

That the Motion to Dismiss of the defendants BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and JOHN F. CANTRELL, County Treasurer of Tulsa County, State of Oklahoma, should be treated as a Motion for Summary Judgment, and should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Judgment in the case of *Pearce* v. *Board of County Commissioners, et al,* Tulsa County No. C-78-2116, is not a void judgment, and being a valid Judgment will not be vacated by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's Motion for Summary Judgment be and it is hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Motion for Summary Judgment of the defendants EDWARD P. LEWIS and EUGENE A. PELIZZONI be and it is here by sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Motion to Dismiss of the defendants BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and JOHN F. CANTRELL, County Treasurer of Tulsa County, State of Oklahoma, be and it is hereby treated by this Court as a Motion for Summary Judgment, and is sustained.

Done and dated in open Court the day and year first above written.

/s/ Jane P. Wiseman
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

/s/ Pat Malloy
PAT MALLOY, Attorney for Plaintiff

/s/ Ronald Bernbaum
RONALD BERNBAUM, Attorney for Plaintiff

/s/ Philip McGowan
PHILIP McGOWAN, Attorney for Defendants
EDWARD F. LEWIS and EUGENE A. PELIZZONI

/s/ Marilyn Dohnalek
MARILYN DOHNALEK, Attorney for Defendants
EDWARD F. LEWIS and EUGENE A. PELIZZONI

/s/ Doris Fransein
DORIS Fransein, Attorney for Defendants
BOARD OF COUNTY COMMISSIONERS, Tulsa County, State of Oklahoma, and JOHN F. CANTRELL, County Treasurer of Tulsa County, Oklahoma

DISTRICT COURT
FILED
DEC 11 1986

DON E. AUSTIN, COURT CLERK
STATE OF OKLA., TULSA COUNTY

APPENDIX C

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

CHARLES PEARCE, Plaintiff,	)	
vs.	)	No. C 78-2116
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JOHN F. CANTRELL, County Treasurer of Tulsa County, State of Oklahoma, and MONICA L. SHARUM, W.M. DUNN, MRS. WINONA WINES, WILFORD E. WINES, GULF OIL CORPORATION, A.J. GEIGER, and A.N. EDWARDS, if living, or if all of them are dead, then their unknown heirs, executors, administrators, devisees, trustees and assigns, immediate and remote, Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

NOW, on this 4th day of December, 1978, the above entitled cause having been regularly assigned for trial, comes on to be heard in its regular order; plaintiff appearing in person and by his attorney, John W. Hampton, and the defendants herein, John F. Cantrell, County Treasurer of Tulsa County, the Board of County Commissioners of Tulsa County, Oklahoma, appearing by their attorney, John F. Reif, Assistant District Attorney of Tulsa County, Oklahoma; and it further appearing that all other defendants named in this action, although three times called in open court to appear, accept,

plead or answer to the petition of the Plaintiff herein, came not but each of them made default.

The Court further finds from an examination of the files in this cause that the defendants, John F. Cantrell, County Treasurer of the County of Tulsa, Oklahoma, and the Board of County Commissioners, Tulsa County, Oklahoma, have been served by personal service more than thirty (30) days prior to this date, and Gulf Oil Corporation has caused to be filed their disclaimer of any lien or interest in the hereinafter described real property.

The Court further finds from an examination of the files in this cause that the defendants herein, Monica L. Sharum, W.M. Dunn, Mrs. Winona Wines, Wilford E. Wines, A.J. Geiger, and A.N. Edwards, if living, or if one or all of them are dead, then the unknown heirs, executors, administrators, devisees, trustees and assigns, immediate and remote, and those of them that are dead have been duly and legally served by publication; that the first publication was made more than forty-one (41) days before this date and such publication was made in the manner and form required by the laws of the State of Oklahoma and that the said defendants have not answered or filed other pleadings herein.

That the Court has conducted a judicial inquiry into the sufficiency of plaintiff's search to determine the names and whereabouts of the defendants who were served herein by publication and based on the evidence adduced, the Court finds that plaintiff has exercised due diligence, and has conducted a meaningful search of all reasonable, available sources at hand. The Court approves the publication service given herein as meeting both statutory requirements and the minimum standards of state and federal due process.

It is further ordered that all of said defendants are hereby

adjudged to be in default, and that the allegations of plaintiff's petition be taken as true and confessed as against them and each of them.

Trial by jury has been waived in open court and parties appearing having announced ready for trial, and the Court having heard all of the evidence and being fully advised in the premises, finds that all of the allegations contained in plaintiff's petition are true as therein set forth and the issues of fact and law, generally in favor of the plaintiff; that the plaintiff is the owner of the real property involved in this action, situated in Tulsa County, State of Oklahoma, described as follows, to wit:

> All of the North Half (N/2) of the Northeast Quarter (NE/4) of the Southeast Quarter (SE/4) of Section Nineteen (19), Township Twenty-One (21) North, Range Thirteen (13) East, lying north of Bird Creek, and described by metes and bounds as follows: Beginning at a stake, the northeast corner of the said N/2 of NE/4 of SE/4 of Section 19; thence West 1320 feet to the Northwest corner of the said N/2 of the NE/4 of SE/4 Section 19; thence South 70 feet to the center of Bird Creek; thence in a Southeasterly direction following the center of the channel of said Bird Creek to a point 30 feet North of the Southeast corner of the said N/2 of NE/4 of SE/4 of Section 10; thence North 630 feet to the place of beginning, Tulsa County, State of Oklahoma.

and that judgment should be entered quieting and confirming the title of the plaintiff thereto against all claims or demands of the defendants herein.

The Court further finds that the aforesaid property herein involved sold at the November 5, 1962 tax sale for the nonpayment of delinquent ad valorem taxes, interest, penalties

and costs; and that all proceedings, notices and duties provided, required and imposed by law prerequisite to the vesting of authority in the County Treasurer of Tulsa County, Oklahoma; to conduct said tax sale and to execute said tax deeds were followed and complied with and performed and that the said annual tax sale and the tax deed executed pursuant thereto was legal and valid in all respects and operated to cancel and void all right, title, lien and interest had or claimed by former owners of, or lienholders against, said property at the time of the said tax sale and to vest a new, independent, virgin title to said property in the tax sale purchaser.

The Court further finds that at the time the hereinbefore described property was sold at the said tax sale, Mrs. Winona Wines was the record owner thereof. That Mrs. Winona Wines, if living or if deceased, then her unknown heirs, executors, administrators, devisees, trustees and assigns, immediate and remote, have been made parties defendants herein; that any right, title, or interest had or claimed by said defendant has been cancelled and voided by the said tax sale and the said defendant has no right, title or interest in and to said property and should be barred and enjoined from asserting any right, title or interest therein.

The Court further finds that at the time of the said tax sale, Charles Pearce was the purchaser thereof; that the tax deed executed pursuant thereto is legal and valid in all respects and operated to cancel and void all right, title, lien and interest had or claimed by former owners of, or lienholders against, the said property at the time of said tax sale and to vest a new, independent, virgin title to said property in the said purchaser, Charles Pearce.

The Court further finds that the plaintiff, Charles Pearce, derived his title to the said, hereinbefore described, real pro-

perty by way of a County Treasurer's Certificate Tax Deed, dated February 6, 1967; that all proceedings, notices and duties provided, required and imposed by law, prerequisite to the vesting in the Board of County Commissioners of Tulsa to confirm the tax resale proceedings were complied with and were performed.

The Court further finds that the plaintiff and his predecessors in title, immediate and remote, who were in privity with the plaintiff, have for more than fifteen (15) years been in actual, open, adverse, notorious, visible, exclusive and continuous possession of the said described real property, and each and every part thereof under claim of title and exclusive of every other right and that the plaintiff has a perfect title by prescription as well as by legal conveyances.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants herein named and each of them, adjudging and decreeing that the said tax sale and the tax deed executed pursuant to such a sale was legal and valid and is hereby declared to be legal and valid in all respects, and that by reason of said valid sale, any right, title or interest, in all respects, and that by reason of said valid sale, any right, title, or interest in or to said property, or part thereof, that might be had or claimed by the other defendants herein and each of them, is decreed to have been extinguished, cancelled and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff herein is the owner of the legal title, and fee simple title, in and to the above described real property and that his title thereto is valid and perfect, and is hereby quieted, and confirmed against all claims and demands of the defendants and each of them; that the plaintiff has a perfect title by prescription as well as by legal conveyance; that the defendants, and each of them, and those claiming

adversely to the plaintiff by, through or under them, be and they are hereby perpetually enjoined and forbidden from commencing any suit to disturb the plaintiff in his possession and title to such property and the peaceful enjoyment of same.

That the costs of this action be taxed to the plaintiff.

/s/ B.R. Beasley
Judge of the District Court

APPROVED:

/s/ John F. Reid
Assistant District Attorney,
Attorney for John F. Cantrell, County Treasurer of Tulsa, State of Oklahoma and the Board of County Commissioners, Tulsa County, Oklahoma

/s/ John W. Hampton,
John W. Hampton,
Attorney for Plaintiff

DISTRICT COURT
FILED
DEC 4 1978

DON E. AUSTIN, COURT CLERK
STATE OF OKLA., TULSA COUNTY

APPENDIX D

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS

DIVISION 3

April 11, 1989

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

68,690 - Gregory Alan Wise, Appellant v. Shala Lynn Wise, Appellee.

Appellant's Petition for Rehearing is *DENIED*.

67,889 - Monica McCabe, Appellant v. Board of County Commissioners, Tulsa County, Oklahoma, John F. Cantrell, County Treasurer of Tulsa County, State of Oklahoma, and W.M. Dunn, Mrs. Winona Wines, Gulf Oil Corporation, A.J. Gieger, Charles Pearce, a/k/a Charles L. Pearce, Marilyn M. Pearce, Bonnie K. Gonzales, A.N. Edwards, Pet-Chem, Inc., Mayabb Drilling, Inc., P. & L. Energy, Inc., James E. Barnett, Gerald E. Elliott, and Bigheart Pipeline Corporation, Defendants, Eugene A. Pelizzoni and Edward F. Lewis, Appellees.

Appellant's Petition for Rehearing is *DENIED*.

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 11th day of April, 1989.

/s/ James P. Garrett
JAMES P. GARRETT, Presiding Judge

COURT OF APPEALS
STATE OF OKLAHOMA
APR 11 1980
JAMES W. WATTERSON
CLERK

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MONICA McCABE,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	No. 67,889
BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA, and W.M. DUNN, MRS. WINONA WINES, GULF OIL CORPORATION, A.J. GIEGER, CHARLES PEARCE, a/k/a CHARLES L. PEARCE, MARILYN M. PEARCE, BONNIE K. GONZALES, A.N. EDWARDS, PET-CHEM, INC., MAYABB DRILLING, INC., P. & L. ENERGY, INC., JAMES E. BARNETT, GERALD E. ELLIOTT, BIGHEART PIPELINE CORPORATION, Defendants,	)	
	)	
EUGENE A. PELIZZONI and EDWARD F. LEWIS,	)	
Appellees.	)	

O R D E R

The petition for writ of certiorari by the appellant in the above styled and numbered cause is granted.

This order is entered subject to the inherent right of this Court, in its discretion, to order the filing of additional briefs

if deemed necessary by the Court. This order is further subject to the provisions of 12 O.S. 1981, ch. 15, App. 3, Rules 3.16.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 13TH DAY OF NOVEMBER 1989.

/s/ Rudolph Hargrave
CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 13 1989
JAMES W. PATTERSON
CLERK

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APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

MONICA McCABE,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	No. 67,889
BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA, and W.M. DUNN, MRS. WINONA WINES, GULF OIL CORPORATION, A.J. GIEGER, CHARLES PEARCE, a/k/a CHARLES L. PEARCE, MARILYN M. PEARCE, BONNIE K. GONZALES, A.N. EDWARDS, PET-CHEM, INC., MAYABB DRILLING, INC., P. & L. ENERGY, INC., JAMES E. BARNETT, GERALD E. ELLIOTT, BIGHEART PIPELINE CORPORATION, Defendants,	)	
	)	
EUGENE A. PELIZZONI and EDWARD F. LEWIS,	)	
Appellees.	)	

ORDER

Upon consideration of the above styled and numbered cause, THE COURT FINDS:

1) Certiorari granted in the instant cause on November 13, 1989, should be recalled as improvidently granted.

2) Certiorari should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order granting certiorari be recalled as improvidently granted, and that certiorari be denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26TH DAY OF FEBRUARY, 1989. [SIC].

/s/ Rudolph Hargrave
Chief Justice

HARGRAVE, C.J., OPALA, V.C.J., LAVENDER, SIMMS, DOOLIN, WILSON,
KAUGER, JJ., Concur;
SUMMERS, J., Dissent

FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 20 1990
JAMES W. PATTERSON
CLERK

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STATE OF OKLAHOMA)
)
SUPREME COURT)

MANDATE

MCCABE, MONICA
VS.

) NO. 67,889
) TULSA COUNTY
) DISTRICT COURT
) CJ854803

BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, ET AL

THE SUPREME COURT OF OKLAHOMA:

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF TULSA COUNTY IN SAID STATE OF OKLAHOMA.

WHEREAS, THE SUPREME COURT OF THE STATE OF OKLAHOMA, DID ON THE 28TH DAY OF FEBRUARY, 1989 RENDER A MEMORANDUM OPINION IN THE ABOVE ENTITLED CAUSE, APPEALED FROM THE DISTRICT COURT OF TULSA COUNTY.

AFFIRMED

NOW, THEREFORE, YOU ARE HEREBY COMMANDED TO CAUSE SUCH AFFIRMANCE TO SHOW OF RECORD IN YOUR COURT AND TO ISSUE SUCH PROCESS AND TAKE SUCH OTHER AND FURTHER ACTION AS MAY BE IN ACCORD WITH RIGHT AND JUSTICE AND SAID OPINION.

WITNESS, THE HONORABLE RUDOLPH HARGRAVE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF OKLAHOMA, AT THE CITY OF OKLAHOMA CITY, THIS 01ST DAY OF MARCH, 1990.

JAMES W. PATTERSON, CLERK
BY /s/ ABBIE DEDRICK, DEPUTY.

APPENDIX G

November 7, 1986
13001 East 40th St. S., Apt. 1306
Tulsa, Oklahoma 74134
(918) 622-7249

The Honorable Jane P. Wiseman
District Judge
Tulsa County Courthouse
500 South Denver
Tulsa, Oklahoma 74101

RE: Monica McCabe vs. Board of County Commissioners, et. al, Tulsa County No. CJ-85-4803

Dear Judge Wiseman:

I am sending this letter pursuant to your request, at the hearing of October 24, 1986.

The issue in this case is whether I can be divested of title to my severed minerals which I legally and properly obtained from the estate of my deceased mother. Can I be divested of my good and valid title by obviously defective legal proceedings which violate due process in every way imaginable?

In this case you have been furnished undisputable evidence that a surface tax deed purporting to convey part of my property to Charles Pearce is absolutely void for admitted lack of notice. You have also been furnished undeniable evidence that Charles Pearce did not acquire my property by adverse possession.

Charles Pearce claims title to part of my property by, (1) the void tax deed, where no notice whatsoever was given, although the law specifically required written notice, (2) ad-

verse possession of the surface overlying my minerals, and (3) an unrecorded judgment obtained by concededly erroneous publication notice, entirely defective on its face.

You have been furnished evidence that the judgment is void for an IMPOSSIBLE legal description, set forth on all the pleadings within the "Judgment Roll." I do not own, nor have I ever owned any property in "Section 10", although the judgment purporting to "take" my property quiets title to property in "Section 10."

There is no way any judgment can make a void tax deed valid. The law, 68 O.S. §451 (1961), required written notice to the severed mineral owner before a valid tax deed could issue. No notice of any kind was given. Charles Pearce admits that fact in his answers to Interrogatories. Accordingly, this brings before you a violation of due process of the greatest possible magnitude that couldn't possibly be corrected.

You have been furnished incontestable evidence demonstrating an unspeakable mockery of due process. Publication statutes are to be STRICLTY FOLLOWED, and the law required a proper description of the property to be set out on the publication notice. 12 O.S. §170.7[4] (1972). It was not so set out.

An impossible legal description is set forth on the publication notice. Any publication containing an impossible legal description cannot under any circumstances give valid notice.

Can a judgment affecting real estate which can't be recorded due to an impossible legal description be a valid judgment? Plain and simple, it can't.

A judgment based on a defective, impossible publication is a clear denial of due process. A defective publication notice is no notice at all.

In *Newman v. Cornelius*, 83 Cal. Rep. 435 (1970), it is stated: . . . . "The rule is settled concerning the purpose of a quiet title action., Applied to judgments, the rule is that the description in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain decription, or no description at all, renders the judgment erroneous and void. . . ."

In *Redlands v. Nickerson*, 10 Cal. Rep. 431 (1961), it was held that a purported description in a judgment affecting real estate which is no description at all renders the judgment void.

In *Standall v. Teater*, 525 P.2d 347 (Iowa 1974) it was held that a judgment defining rights to land must be precise in its description.

And, in *Newport v. Hatton*, 231 P. 987 (Cal. 1925) it was also held that a description in a judgment affecting real estate should be certain and specific, and an impossible, wrong, or uncertain description, or no description at all, makes the judgment void.

I am sure Your Honor is aware that under the State Action Doctrine, no state can deprive any person of property without due process of law. The State Action Doctrine is such that equal protection of the laws cannot be denied by any state authority, to any individual. The Fourteenth Amendment of the United States Constitution is the foundation of the State Action Doctrine. And, it goes without saying that the Fourteenth Amendment is a federally guaranteed and protected right.

The laws requiring notice are to be applied to everyone. The United States Supreme Court has held in the case of *Covey v. Somers*, 351 US 141, 100 L.Ed. 1021 (1956) that due process requires the owner of land to be given notice of a pro-

ceeding to foreclose a tax or similar lien. I, nor my deceased mother, were ever given any notice as required by law. The Fourteenth Amendment protects me in this situation from being deprived of my property, and I respectfully insist that Your Honor afford me the due process to which the law guarantees I am entitled. I do not insist on anything more than that.

It is my conviction that any judgment adjudging Charles Pearce to be the owner of part of my property, is an express denial of due process. Any individual, upon being denied due process by the state, is entitled to seek appropriate relief in the Federal Courts, for illegal deprivation of a guaranteed Constitutional right.

Extensive research by my attorneys reveals that there has never been a case, such as that before the Court now, where an individual was divested of property by virtue of void proceedings for total lack of notice, and *complete denial of due process*. There are certainly no cases where a void tax deed has later been validated by a subsequent judgment, because that is an obvious impossibility. There are no Oklahoma cases in which a mineral owner was ever divested of title by an admittedly void Certificate Tax Deed or by adverse possession of the overlying surface estate.

To the contrary, the PUBLIC POLICY of Oklahoma Courts has always been to protect the mineral interest owner. State and Federal Courts have always held that without notice, a property owner cannot be divested of title.

In summary, all methods by which Charles Pearce claims title to my property were legally ineffectual. My evidence proving denial of due process has not been controverted by any defendant in this case. To the contrary, opposing counsel is asking you to deny me the due process to which I am entitled.

Courts of equity don't exist to condone obvious frauds brought to their attention, nor to promote them by validating judgments brought about by a complete denial of due process.

Enclosed you will find my Affidavit of Ownership. I request that you adjudge me to be the owner of the severed minerals I have sued for.

Very truly yours,

/s/ Monica McCabe
Monica McCabe

MM
Enclosure
cc: Philip McGowan

DISTRICT COURT
FILED
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DON E. AUSTIN, COURT CLERK
STATE OF OKLA., TULSA COUNTY

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AFFIDAVIT OF OWNERSHIP

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

MONICA McCABE, being first duly sworn, upon her oath, states as follows:

1. I was born in the United States of America on April 24, 1934, in the State of New York, City of New York City, and am a citizen of the United States of America and am entitled to the right to own property which is guaranteed to all citizens by the United States Constitution.

2. I am the owner of the following property —

An undivided ¼ interest in and to all of the oil, gas, and other minerals in and under the North Half (N/2) of the Northeast Quarter (NE/4) of the Southeast Quarter (SE/4) of Section Nineteen (19), Township Twenty-One (21) North, Range Thirteen (13) East, Tulsa County, State of Oklahoma.

3. With respect to the lawsuit styled *Charles Pearce v. Board of County Commissioners, Tulsa County No. C-78-2116,* I, nor my deceased mother, ever received any summons, nor was summons ever issued to either of us. The only service in that lawsuit was one of defective publication, with an impossible land description. I do not, nor did I ever own any real estate in "Section 10."

4. To even possibly suggest that the sham judgment in the case of *Charles Pearce vs. Board of County Commissioners, Tulsa County No. C-78-2116,* confiscates my severed minerals, is a denial of due process of the highest order, in direct

violation of the guarantees afforded me by the Fourteenth Amendment to the United States Constitution.

Dated November 4, 1986

/s/ Monica McCabe
MONICA McCABE

Subscribed and sworn to before me, the undersigned Notary Public, this 4 day of November, 1986.

/s/ Anne M. Fream
Notary Public

My commission expires:
May 29, 1989
(NOTARIAL SEAL)

APPENDIX H

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

MONICA McCABE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JOHN F. CANTRELL, County Treasurer of Tulsa County, State of Oklahoma, and W.M. DUNN, MRS. WINONA WINES, WILFORD E. WINES, GULF OIL CORPORATION, A.J. GEIGER, CHARLES PEARCE a/k/a CHARLES L. PEARCE, MARILYN M. PEARCE, BONNIE K. GONZALES, A.N. EDWARDS, PET-CHEM, INC., MAYABB DRILLING, INC., P. & L. ENERGY DEVELOPMENT, INC. a/k/a P. & L. ENERGY, INC., EUGENE A. PELIZZONI, EDWARD F. LEWIS, JAMES E. BARNETT, GERALD E. ELLIOTT, and BIGHEART PIPELINE CORPORATION, if living, or if all of them are dead, then their unknown heirs, executors, administrators, devisees, trustees and assigns, immediate and remote,	)	No. CJ-85-4803
	)	
Defendants.	)	
	)	

PLAINTIFF'S RESPONSE TO BRIEFS IN SUPPORT OF VALIDITY OF JUDGMENT

The Fifth Amendment of the United States Constitution provides in part:

"No person shall be ***** deprived of life, liberty, or property without due process of law; *****"

The Fourteenth Amendment of the United States Constitution provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Oklahoma Constitution, Article 2, §23 provides:

"No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, *****"

Due process commands notice which reasonably informs a person that his legally protected interest may be adversely affected. *Matter of C.G.*, 637 P.2d 66 (Okl. 1981).

The owner of property cannot be divested of it except by his consent or in the manner provided by law. *Mozley v. Coleman*, 212 P. 431 (Okl. 1923).

65 Am. Jur. 2d QUIETING TITLE §92 provides, in part:

"A decree for relief beyond the issues submitted, being unauthorized and beyond the power of the court, may be collaterally attacked at any time by a party in interest, whether a party to the suit or not."

46 Am. Jur. 2d JUDGMENTS §813 provides, in part:

"A court of equity will generally relieve against a judgment rendered by a court of law without jurisdiction, whether the absence of jurisdiction resulted from rendering a judgment in excess of the amount within the jurisdiction of the court, or from the absence of service of process on the defendant, and whether the applicant had, or had not, knowledge of the pendency of the action in which the judgment was rendered."

Where title to property is based on a tax deed, a subsequent quiet title judgment cannot change the validity of the tax title. Neither the statute of limitations or laches applies where one cotenant is in possession of land by right, and such possession will not be deemed to be adverse to his cotenants out of possession without a clear showing of the adverse claim being brought home to them. *Bevan v. Shelton*, 469 P.2d 245 (Okla. 1970).

All aspects of a judgment must be taken into consideration when the validity of the judgment is attacked. *Mobbs v. City of Lehigh*, 548 P.2d 1048 (Okl. 1976).

In the instant case, plaintiff has sued to *quiet title* to her in severed minerals which she acquired by an unchallenged Executor's Deed. This Court can look to any relevant evidence it wishes to determine the ownership of the "property the plaintiff has sued for." The Court is not restricted to any "judgment roll" in considering evidence relevant to whether plaintiff has title, or PEARCE does not have title, despite the fact that there is certain evidence the defendants wish to conceal from this Court, damaging to them.

THE PLAINTIFF HAS PROVEN BY THE OWN ADMISSION OF PEARCE THAT THE TAX DEED TO HIM IS VOID, FOR LACK OF REQUIRED STATUTORY NOTICE

(LACK OF DUE PROCESS). The defendants do not deny this.

SINCE THE TAX DEED IS VOID, ANY JUDGMENT BASED THEREON IS VOID. A judgment could not correct the admitted failure to give notice, required for the issuance of a VALID tax deed.

Finally, the plaintiff would call to this Court's attention that the Judgment which the defendants seek to uphold as valid, is actually *VOID ON ITS FACE*. The Judgment sets forth an incorrect legal description, and therefore did not quiet title to the property the plaintiff has sued for. Further, the Judgment states on its face that Winona Wines was the record owner of the subject property, when in fact she was the record owner of the *surface only*, of the subject property, and not of the underlying minerals. PEARCE has admitted this under oath.

At this point, this Court has not received any evidence or legal authorities from any defendants supporting the validity of the Judgment in question.

On the other hand, the plaintiff has proven to this Court she is the owner of the property she has sued for, and any void deed for lack of notice purportedly divesting her of title, subsequently reduced to judgment not of record lacking subject matter jurisdiction, violates every notice of due process imaginable.

THERE HAS NEVER BEEN AN OKLAHOMA CASE WHERE A SEVERED MINERAL OWNER WAS DIVESTED OF TITLE BY VIRTUE OF A VOID TAX DEED AND VOID JUDGMENT.

/s/ Ronald Bernbaum
RONALD BERNBAUM OBA 737
Attorney for Plaintiff
3545 E. 51st St., Suite 34
Tulsa, Oklahoma 74153
(918) 742-0232

CERTIFICATE OF DELIVERY

I hereby certify that on the 30th day of September, 1986, I hand delivered a copy of the above and foregoing Plaintiff's Response to Briefs in Support of Validity of Judgment, to Phil McGowan.

/s/ Ronald Bernbaum
RONALD BERNBAUM

(2)

No. 89-1819

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MONICA McCABE,

Petitioner,

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DAVID MOSS
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Tulsa, Oklahoma 74103
(918) 584-0440
Attorneys for Respondents
Board of County Commissioners
and John F. Cantrell, County Treasurer

*Counsel of Record
June, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review by Writ of Certiorari questions which were not properly presented below, and therefore, were not addressed by the Oklahoma Court of Appeals.

2. Whether this court should grant certiorari to review a question of state law that does not involve a substantial federal question.

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I.

This court lacks jurisdiction because the court below decided the issues correctly on independent state grounds. Further, this court should refuse to grant certiorari to review a question of state law that does not involve a substantial federal question. 12

II.

This court lacks jurisdiction to review on certiorari federal questions not properly presented or decided below. 14

III.

This case presents no question important enough to justify granting certiorari. 1

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No. 89-1819

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MONICA McCABE,

Petitioner,

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Board of County Commissioners of Tulsa County, and John F. Cantrell, County Treasurer, by and through David Moss, District Attorney of Tulsa County, respectfully request that this Court deny issuance of a Writ of Certiorari to review the Opinion of the Court of Appeals

for the State of Oklahoma, Division No. III, entered on February 28, 1989.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the State of Oklahoma, Division III, is fully set forth in the appendix of the Petition for Certiorari (pp. 1a-7a), and therefore is not reprinted herein. Respondents would, however, advise this Court of the following typographical errors in that opinion as set forth by Petitioner:

1. The legal description in paragraph 1 on page 2a of Petitioner's Appendix should read as follows: "N/2 NE/4 SE/4 § 19-T21N-R13E I.M.";

2. The second line on page 4a of Petitioner's Appendix should read: "ment, the Trial Court ruled that the 1978 quiet-title judgment"; and

3. The fourth line on page 7a of Petitioner's Appendix should read: "309 P.2d 731 (Okla. 1957); accord, *Chamberlin v. Davis*, 191."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional issues involved, and Petitioner did not present any constitutional issues to the courts below.

Petitioner has not challenged any specific Oklahoma statutes as being repugnant to the United States Constitution. Petitioner is simply unhappy with a state court decision based solely upon the application of state law.

STATEMENT OF THE CASE

In 1962, a 15-acre tract of land was sold, to satisfy past due ad valorem taxes, by the Tulsa County Treasurer and title was taken in the name of the county. In 1963, before expiration of the redemption period, Pearce obtained a tax certificate covering the fifteen acres. In 1965, Pearce applied for a Certificate Tax Deed, which was issued in 1967. On September 29, 1978, in the District Court in and for Tulsa County, Charles Pearce, filed an action to quiet

his title, in fee simple, to the following described tract of real property, to-wit:

> All of the North Half (N/2) of the Northeast Quarter (NE/4) of the Southeast Quarter (SE/4) of Section Nineteen (19), Township Twenty-One (21) North, Range Thirteen (13) East, lying North of Bird Creek, and described by metes and bounds as follows: Beginning at a stake, the Northeast corner of the said N/2 of NE/4 of SE/4 of Section 19; thence West 1320 feet to the Northwest corner of the said N/2 of NE/4 of SE/4 Section 19; thence South 70 feet to the center of Bird Creek; thence in a Southeasterly direction following the center of the channel of said Bird Creek to a point 30 feet North of the Southeast corner of the said N/2 of NE/4 of SE/4 of Section 10; thence North 630 feet to place of beginning, Tulsa County, State of Oklahoma.

One of the named Defendants in that action was Monica L. Sharum. Monica L. Sharum was Petitioner's predecessor in interest through which Petitioner McCabe claims an undivided ¼ interest in and to the minerals underlying a 20 acre tract of land of which the above described property is a smaller part. Pearce claimed title, in fee simple, to each and every part of the above described land by legal title (a Certificate Tax Deed) and by adverse possession. Pearce's Petition stated that:

> Plaintiff further alleges that he and his predecessors in title, immediate and remote, who were in privity with them for more than fifteen (15) years prior to the filing of this Petition, have been in actual, open, adverse, notorious, visible, exclusive and continuous possession of said real property, and each and every part thereof under claim of title and exclusive of every right, and Plaintiff has and asserts title to said property by prescription as well as by said valid conveyance above mentioned and referred to.

Pearce's Petition further claimed that Monica L. Sharum, among others, claimed an interest in the property, adverse to Pearce, and that such claims constituted a cloud on Pearce's title. The relief sought was for the Court to quiet Pearce's fee simple title in the above described tract as against the claims of Monica L. Sharum and others and to forever bar Monica L. Sharum, and the other Defendants, and all persons claiming through, by or under them, from ever asserting any interest in the property.

Service of summons was obtained upon Monica L. Sharum by publication. There was an Affidavit to obtain Service by Publication filed; an affidavit in Lieu of Mailing

Notice and Petition; and a Notice by Publication, as required by the Oklahoma statutes.

On December 4, 1978, Pearce obtained a Journal Entry of Judgment wherein the Court specifically stated that it had conducted a judicial inquiry into the sufficiency of the publication service; found that Pearce had exercised due diligence; and approved the publication service as meeting "both statutory requirements and the minimum standards of state and federal due process." It was further held that, after waiving trial by jury, and putting on evidence and the Court being fully advised, that judgment was granted in favor of Pearce quieting Pearce's title in the above described tract of land. In addition, there was a specific finding that Pearce, and his predecessors in title:

> [h]ave for more than fifteen (15) years been in actual, open, adverse, notorious, visible, exclusive and continuous possession of said described real property, and each and every part thereof under claim of title and exclusive of every other right and that Plaintiff has perfect title by prescription as well as by legal conveyances.

Furthermore, the Judgment quieted Pearce's title and barred Monica L. Sharum, and the other Defendants, and those claiming by, through or under them, from commencing any suit to disturb Pearce in his possession and title to the property. This Judgment was never appealed, set aside or vacated. See Appendix C to Petitioner's Petition, pp. 12a-17a.

Thereafter, Pearce gave an oil and gas lease to Respondents Pelizzoni and Lewis covering the above described tract of land. Pelizzoni and Lewis later assigned the oil and gas lease to P & L Energy Development, Inc., prior to any production being obtained.

On July 11, 1985, Petitioner McCabe filed a lawsuit, from which the instant action arose, collaterally attacking the 1978 judgment obtained by Pearce. Specifically, Petitioner's lawsuit alleged, among other things, that Pearce's 1978 judgment was founded on a County Treasurer's Certificate Tax Deed executed February 6, 1967,

and that the tax sale was irregular and void on its face since a purchaser under a Certificate Tax Deed cannot acquire title to the mineral estate without giving notice to the owner of the mineral estate. Petitioner alleged that there was no notice to the owner of the mineral estate and no adverse possession by Pearce. Petitioner alleged that the Court in the original quiet title action had no subject matter jurisdiction and that Petitioner had a valid defense to the quiet title action. Petitioner requested the Court to vacate the 1978 Journal Entry of Judgment which had quieted title to the property in Pearce.

Respondents Pelizzoni and Lewis filed a Motion for Summary Judgment and Respondents Board of County Commissioners and John F. Cantrell, County Treasurer, filed a Motion to Dismiss. On November 14, 1986, the Tulsa County District Court found:

> "That the Court in the Tulsa County District Court case of *Pearce v. Board of County Commissioners, et al,* Case #C-78-2116, had proper jurisdiction of the parties and the subject matter and the quiet title judgment in favor of Pearce rendered

therein is not void on the face of the judgment roll. The Court specifically finds that the subject property was sufficiently described therein." See Appendix B to Petitioner's Petition, pp. 8a-11a.

As a result, on November 14, 1986, the trial court sustained Respondents', Pelizzoni and Lewis, Motion for Summary Judgment. In addition, the court treated Respondents', Board of County Commissioners and John F. Cantrell, County Treasurer, Motion to Dismiss as a Motion for Summary Judgment, which it sustained. See Petitioner's Appendix B, pp. 8a-11a.

Thereafter, Petitioner McCabe perfected an appeal from the trial court's order in which she stated the following:

Exhibit C

ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

PROPOSITION NO. I:

That the trial court erred as a matter of law in not finding the 1978 Quiet Title Judgment void on the face of the judgment roll as to Appellant. (Petitioner herein)

ISSUES: (1) Whether the petition in the 1978 Quiet Title Suit bestowed subject matter jurisdiction on the court concerning the severed mineral estate.

(2) Whether the court in the 1978 Quiet Title Suit acquired jurisdiction of the parties served only by publication notice on an inadequate affidavit and containing an incorrect legal description. Excerpt from Petition in Error filed in the Oklahoma Supreme Court on December 12, 1986.

On February 28, 1989, the Court of Appeals for the State of Oklahoma, Division III, affirmed the trial court's order holding that the Petitioner's action was a collateral attack on the 1978 judgment which had upheld the tax deed proceedings. Since, however, the appellate court found that the 1978 quiet-title judgment was not void on its face, the court could not reconsider any defects in the tax deed proceedings. See Appendix A to Petition for Certiorari, pp. 2a-7a.

On March 20, 1989, Petitioner filed a Petition for Rehearing with the Court of Appeals. On April 11, 1989, the Court of Appeals denied the Petition for Rehearing. See Appendix D to Petition for Certiorari, pp. 18a-19a.

Petitioner next asked the Oklahoma Supreme Court to issue a Writ of Certiorari to the Court of Appeals. On February 26, 1990, the Oklahoma Supreme Court denied certiorari. See Appendix F to Petition for Certiorari, pp. 22a-23a.

SUMMARY OF ARGUMENT

The Court should not grant a writ of certiorari to hear this case. The Oklahoma Court of Appeals applied long-standing Oklahoma law in refusing to allow Petitioner to collaterally attack the 1978 quiet-title judgment. Thus, the decision below rests on independent and adequate state grounds which deprives this Court of jurisdiction to review these issues by writ of certiorari. Furthermore, Petitioner never raised any federal issues below. Finally, Petitioner has never challenged any specific Oklahoma statute as being repugnant to the Constitution of the United States. Accordingly, this Court should dismiss the Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE COURT BELOW DECIDED THE ISSUES CORRECTLY ON INDEPENDENT STATE GROUNDS. FURTHER, THIS COURT SHOULD REFUSE TO GRANT CERTIORARI TO REVIEW A QUESTION OF STATE LAW THAT DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

The Oklahoma Court of Appeals based its decision solely on independent state grounds. The court found that Petitioner's lawsuit was nothing more than a collateral attack on the 1978 quiet-title judgment. Since the 1978 quiet-title action conclusively dealt with any and all notice issues involved in the 1967 tax deed proceedings, the Oklahoma Court of Appeals held that those issues could not, under Oklahoma law, be relitigated in Petitioner's 1985 lawsuit.

Further, the court found that the allegations of the 1978 petition were sufficient, under Oklahoma law, to vest the

trial court with subject matter jurisdiction in the quiet-title action.

Finally, the Court of Appeals held that the description of the subject property was sufficient, and therefore, the 1978 judgment was not, under Oklahoma law, void.

It has long been the law that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcarin*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945). Justice White, acting individually, has pointed out that this Court's appellate jurisdiction over state courts extends only to final judgments with respect to issues of federal law. *New York Times v. Jascalevich*, 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25 (1978). This case does not present a final state court decision on a federal question, and thus this Court is without jurisdiction.

II.

THIS COURT LACKS JURISDICTION TO REVIEW ON CERTIORARI FEDERAL QUESTIONS NOT PROPERLY PRESENTED OR DECIDED BELOW.

The statute authorizing review of state court decisions by means of a writ of certiorari states, in pertinent part, the following:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,* treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. §1257(a). (Emphasis added.)

Petitioner did not properly "set up or claim" the constitutional challenges that she now asserts. In order to have properly raised, and thus preserved for appeal, the federal question raised herein, Petitioner would have had to directly challenge the constitutionality of the Oklahoma

statutes governing vacation of judgments in the proceedings below. This simply was not done.

Even now Petitioner is not directly challenging the constitutionality of the Oklahoma statutes governing notice by publication nor the Oklahoma statutes governing vacation of judgments. Rather, Petitioner is still attempting to go behind the face of a valid Oklahoma court judgment and challenge the constitutionality of the tax deed proceeding underlying the 1978 quiet-title judgment. Petitioner has completely failed, however, to challenge, as unconstitutional, any specific Oklahoma statute. It is clear that the mere allegation of a federal question will not suffice to give this Court jurisdiction. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902).

III.

THIS CASE PRESENTS NO QUESTION IMPORTANT ENOUGH TO JUSTIFY GRANTING CERTIORARI.

While this Court's Rule 10 is, by its own terms, not exclusive in setting out grounds for exercise of the Courts' discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court seeks to consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any state. Nor does the Court need to exercise its supervisory powers herein. The Petitioner alleges no great dispute between the highest courts of any state on any substantial federal question. No federal question was decided by the courts below. The courts below have acted consistently with the decisions of this Court but found the facts contrary to Petitioner's position.

CONCLUSION

For the reasons stated herein, the Respondents, Board of County Commissioners of Tulsa County, and John F. Cantrell, County Treasurer, respectfully request this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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DISTRICT ATTORNEY

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ASSISTANT DISTRICT ATTORNEY
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Attorneys for Respondents,
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John F. Cantrell, County
Treasurer

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1819

In The

Supreme Court of the United States

October Term, 1989

MONICA McCABE,

Petitioner,

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

REPLY OF PETITIONER TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(918) 742-0232
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a Petitioner has her several minerals confiscated without actual notice, by means of an unsuccessful state court lawsuit (admitted to be wholly without merit by state government respondents), instituted by a surface claimant who had no interest in Petitioner's property, which lawsuit was properly dismissed by the court after judgment setting forth an impossible legal description, does such confiscation amount to a denial of property without due process?

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No. 89-1819

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EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

Respondents.

REPLY OF PETITIONER TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On May 21, 1990, the Petitioner filed with this Court a Petition for a Writ of Certiorari to the Court of Appeals for the State of Oklahoma, Division No. III. Simply stated, the Petition raises a substantial federal issue not decided on any adequate, substantial, or independent state grounds in any Oklahoma Court.

The Oklahoma Courts have upheld the validity of a surface owner's confiscation of property from a severed mineral owner. Charles Pearce (hereinafter Pearce) was

the surface claimant. Petitioner is the mineral owner. The confiscation purportedly took place by means of a 1978 lawsuit (the Pearce suit) rendered without actual notice to petitioner, and by misdescribing her property. The Appearance Docket reflecting all proceedings in the Pearce suit is reprinted in its entirety in Appendix A hereto, pp. 1a-5a, infra.

As this Court can quickly ascertain, the Pearce suit was no ordinary action. It was in litigation from September 29, 1978 through October 17, 1980. Then, on October 17, 1980, it was dismissed by the Court for failure to present.

The Pearce suit was dismissed by the Court, after a judgment. The Oklahoma Courts that decided Petitioner's case were aware of the dismissal. Thus far, it has been disregarded.

Despite the fact the Appearance Docket shows the Pearce suit to have been unsuccessful and therefore properly dismissed, Oklahoma Courts have declared Pearce [a surface claimant] possesses a valid judgment "taking" Petitioner's property [non-surface severed minerals].

All allegations of the Pearce suit, including allegations regarding jurisdiction of the Court to render same, were denied, previous to his unsuccessful lawsuit's dismissal. The denials are reprinted in the Appendix B hereto, pp. 6a-8a, infra. Ironically, the denials were made on January 3, 1979, by Defendants Board of County Commissioners and John F. Cantrell, County Treasurer (hereinafter state government respondents). These defendants who on January 3, 1979, admitted the Pearce suit was wholly

without merit, are the same parties as state government respondents who have now filed a Response to Petition for Writ of Certiorari. Without explanation, the state government respondents have completely changed their position by requesting this Court to uphold the validity of the Pearce suit.

Beyond that, it is unclear what standing the state government respondents have in this Court (as public authorities funded by taxpayer's money) to recant their previous denial of all allegations of a private-party lawsuit, resulting in the illegal confiscation of Petitioner's property.

The Courts below that decided Petitioner's case were aware of the denials by state government respondents. Thus far, the denials have been brushed aside.

Petitioner properly insisted to each Oklahoma Court that heard her case, she had been denied her property without due process of law in violation of the 14th Amendment to the United States Constitution. Nonetheless, the state government respondents deceptively claim in their Response on p. 11, that "Petitioner never raised any federal issues below." They say this despite the fact that Appendices G and H to Petitioner's Petition for a Writ of Certiorari filed on May 21, 1990, clearly show the federal issue of denial of due process to have been raised on more than one occasion.

Interestingly the Court of Appeals for the State of Oklahoma, Division No. III, apparently passing on the Fourteenth Amendment federal due process question, conceded that considering Petitioner's "evidence of lack of notice to the severed mineral interest owners, it would

appear that Appellant's [Petitioner's] allegation of error is well-taken." See p. 4a of Appendix A to Petitioner's Petition for a Writ of Certiorari. Despite this, state government respondents inappropriately insist in their Response (p. 13) that this case "does not present a final state court decision on a federal question, and thus this Court is without jurisdiction."

Because notice has always been synonomous with due process, Petitioner submits that a substantial federal issue was in fact decided, and jurisdiction exists in this Court to declare the confiscation of her property without proper notice an unprecedented denial of her Constitutional rights.

Simply stated, this Court represents a forum of last resort to rectify a wrong repugnant to every notion of fundamental fairness imaginable.

ARGUMENT

Jurisdiction exists in this Court to declare the Pearce suit a flagrant denial of Petitioner's property in violation of due process required under the Fourteenth Amendment to the United States Constitution. 28 U.S.C. § 1257(a)(3) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties,

> or laws of the United States, *or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution* or the treaties or statutes of, or any commission held or authority exercised under, the United States. (Emphasis added)

Pearce never owned Petitioner's severed minerals. Pearce never had any claim to Petitioner's property. Pearce admittedly never gave notice to Petitioner, as required under Oklahoma Law [Okla. Stat., tit. 68 § 451 (1961)] and demanded by federal constitutional law, to acquire a valid certificate tax deed to Petitioner's property.

Pearce never acquired a valid judgment against Petitioner because his unsuccessful lawsuit was dismissed, and the property he sued for was misdescribed. Despite this, Oklahoma Courts have seen fit to award Petitioner's property to Pearce. The effect of this confiscation, unsupportable by any factual or legal basis, is to formulate a novel, special and unparalleled rule of law: a property owner is subject to losing their property if an unsuccessful, dismissed lawsuit is filed against them.

An inadequate and unsupported basis the Oklahoma Courts have attempted to use to uphold the Pearce suit is collateral estoppel. Oklahoma Courts have decided that since Pearce supposedly litigated title to Petitioner's property once (in the Pearce suit), Petitioner is precluded from re-litigating the issue. That does not make sense to Petitioner, and should not make sense to this Court, because Pearce never litigated title to Petitioner's property. Consequently, his lawsuit was dismissed by the Court.

Under Oklahoma law the statute of limitations for vacating the dismissal of Pearce's lawsuit has expired. Okla. Stat., Tit. 12 §§ 1031-1038 (1910-1969) The dismissal stands. There is no legal authority that a dismissed lawsuit can be transformed into a valid judgment.

The Oklahoma Courts have failed to address the non-vacatable dismissal, because common sense dictates that an unsuccessful, dismissed lawsuit cannot possibly support a valid judgment.

Another inadequate and unsupported basis for validating the Pearce judgment, according to Oklahoma courts, has been to approve a misdescription of the property Pearce sued for throughout his dismissed suit. To the knowledge of Petitioner there is no authority holding that a misdescription of property in a publication notice in a suit to adjudicate title can support a valid judgment. To condone such a misdescription is unheard-of in the history of American Jurisprudence.

Jurisdiction must exist to declare as a denial of due process an admittedly dismissed lawsuit as the only evidence being asserted against Petitioner to deprive her of property. Otherwise every baseless suit against a property owner which failed, and was thereafter dismissed, could in fact be used to confiscate property, so long as every State court called upon to void the suit refused to consider the dismissal. At some point this Court would be obligated to declare such patently illegal and outrageous confiscations violative of the Fourteenth Amendment to the United States Consititution. That time has come. Petitioner has never been afforded any opportunity to defend against the confiscation of her property. See

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

In each Oklahoma Court below, Petitioner has claimed, thus to no avail, a denial of her property without due process, violative of the Fourteenth Amendment to the United States Constitution.

Appendix C, pp. 9a-20a, infra, is a complete transcript of the decision of the Oklahoma Trial Court. In this transcript state government respondents admit they have no interest in this case. However, they seek to defend Pearce's title, for reasons unexplained. Further, Appendix C reveals the constitutional issue was specifically brought to the attention of the Oklahoma Trial Court, and that the Court refused to consider it. Petitioner refers this Court to *Wolfe v. North Carolina*, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 1650 (1960) wherein this Court stated:

> "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this court by putting forward nonfederal grounds of decision which are without any fair or substantial support."

CONCLUSION

Petitioner has properly brought before this Court a series of corrupt legal maneuvers by Pearce coupled with unsupportable Oklahoma Court decisions that distort every conception of due process imaginable. This case presents much more than exceptional circumstances. It represents an unequalled and unconscionable disregard of property rights with far reaching consequences.

The only judgment the unsuccessful, dismissed Pearce suit can support is one of dismissal, and Oklahoma Courts have been refusing to recognize that as Petitioner is concerned.

Petitioner requests this Court grant certiorari, or in the alternative vacate the Memorandum Opinion of the Court of Appeals for the State of Oklahoma, Division No. III and remand for further proceedings and guidance, in harmony with the Fourteenth Amendment of the United States constitution.

RONALD BERNBAUM
2828 E. 51st St., #301
Tulsa, Oklahoma 74105
(918) 742-0232
Counsel for Petitioner

No.	Title Of Cause	Nature Of Action	Attorneys	
	Charles Pearce,		John W. Hampton	Plaintiff
	vs.			
	Board of County Commissioners, Tulsa County, Okla., John F. Cantrell, County Treasurer of Tulsa County, Okla., & Monica L. Sharum, W.M. Dunn, Mrs. Winona Wines, Wilford E. Wines, Gulf Oil Corp., A.J. Geiger, & A.N. Edwards, Et Al,	Quiet Title		Defendant

APPENDIX A

Date		Clerk's Costs	Sheriff Costs	Misc. Fees	Dis-burse-ments	Credits	Bal-ance
9-29-78	File Petition						
Sep 29 78	223,637 RECD John W. Hampton Cost CK					50.00	50.00
Sep 29 78		34.00		3.00			10.00
				3.00			
Oct 2 78	Report	34.00	.00	6.00	40.00		10.00
Sep 29 78	File Notice By Publication L.N.						
Sep 29 78	File AFFI To Obtain Ser By Publication						
Sep 29 78	File AFFI In Lieu Of Mailing Notice And Petition						10.00

Date	Continued	Clerk's Costs	Sheriff Costs	Misc. Fees	Dis-burse-ments	Credits	Bal-ance
Oct 3 78	File Ret Summons Ser Bd Co Cmmrs By Ser Co Clk Oct 2 Ser John F. Cantrell Co Treas Oct 2		7.00				
Oct 3 78	File Summons Cert Mail To Corp Co Report	3.00					
Illegible	Report	3.00	7.00	0.00	10.00		0.00
Oct 5 78	File Ret Cert Mail Rec Del Corp Co Oct 4						.00
Oct 19 78	File Proof Of Publ LN			91.20			91.20
Oct 26 78	File Entry Of Appearance By Deft Gulf Oil Corp. Michael C. Smith Atty						91.20
Nov 6 78	File Disclaimer Of Gulf Oil Corp						91.20

Date	Continued	Clerk's Costs	Sheriff Costs	Misc. Fees	Dis-burse-ments	Credits	Bal-ance
Dec 4 78	229,067 RECD John W. Hampton Cost CK					91.20	.00
Dec 6 78	80,829 Paid Tulsa Daily Legal News Pub			91.20			.00
12-4-78	JE of judgt per JE BEASLEY						
Dec 4 78	File J E Of JDGT						.00
Dec 4 78	File Disclaimer By Deft Wilford E. Wines						.00
Dec 20 78	File Order Of Transfer Or Reassignment To Judge Comfort						.00
Jan 3 79	File ANS Of Co Treas						.00

Date	Continued	Clerk's Costs	Sheriff Costs	Misc. Fees	Dis-burse-ments	Credits	Bal-ance
Jan 3 79	File ANS Of Defts BD Of Co Comm						.00
1-3-79	LV granted to file out of time RICKETTS						
10-1-80	Set for disposition docket on 10-17-80 @9:00 Comfort						
10-17-80	Dismissed for Failure to present. Comfort						

APPENDIX B

IN AND FOR THE DISTRICT COURT OF
TULSA COUNTY STATE OF OKLAHOMA

CHARLES PEARCE, Plaintiff, v.s. BOARD OF COUNTY COMMISSIONERS, et al., Defendants.	)	NO. C-78-2116 FILED JAN 3 1979

ANSWER OF DEFENDANTS, BOARD OF COUNTY COMMISSIONERS

The Board of County Commissioners of Tulsa County, Oklahoma, Defendant herein, for its Answer to the Petition of the Plaintiffs, alleges and states, that it denies each and every allegation contained therein.

WHEREFORE, having fully answered, this Defendant prays that Plaintiffs take nothing as against it by virtue of their Petition herein, but that this Defendant recover from the Plaintiffs its costs expended herein.

BOARD OF COUNTY
COMMISSIONERS OF TULSA
COUNTY, OKLAHOMA,

BY: /s/ Deryl L. Gotcher, Jr.
ASSISTANT DISTRICT
ATTORNEY

Leave granted to file this 3rd day
of January, 1979.

/s/ Ronald Ricketts
DISTRICT JUDGE

I, Deryl L. Gotcher, Jr., Assistant District Attorney of District 14, Tulsa County, Oklahoma, on the 3rd day of January, 1979, deposited in the United States Mail, with full postage affixed thereto, an envelope containing a full true and correct copy of the foregoing Answer to: John W. Hampton, 512 Mayo Building, Tulsa, Oklahoma 74103.

/s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

IN AND FOR THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

CHARLES PEARCE, Plaintiff, v.s. BOARD OF COUNTY COMMISSIONERS, et al., Defendants.	)	NO. C-78-2116 FILED JAN 3 1979

ANSWER OF COUNTY TREASURER

John F. Cantrell, Tulsa County Treasurer, Defendant herein, for his Answer to the Petition of the Plaintiffs, alleges and states, that he denies each and every allegation contained therein.

WHEREFORE, having fully answered, this Defendant prays that Plaintiffs take nothing as against him by virtue

of their Petition herein, but that this Defendant recover from the Plaintiffs his costs expended herein.

JOHN F. CANTRELL,
TULSA COUNTY TREASURER

S. M. FALLIS, JR.
DISTRICT ATTORNEY

BY: /s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

Leave granted to file this 3rd day of January, 1979.

/s/ Ronald Ricketts
DISTRICT JUDGE

I, Deryl L. Gotcher, Jr., Assistant District Attorney of District No. 14, Tulsa County, Oklahoma, on the 3rd day of January 1, 1979, deposited in the United States Mail, with full postage affixed thereto, an envelope containing a full true and correct copy of the foregoing Answer to: John W. Hampton, 512 Mayo Building, Tulsa, Oklahoma 74103.

/s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

APPENDIX C

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY STATE OF OKLAHOMA

MONICA McCABE,	)	
	)	
Plaintiff,	)	CASE NO
-vs-	)	CJ 85-4803
	)	
BOARD OF COUNTY COMMISSIONERS, et, al,	)	
	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JANE P. WISEMAN

November 14, 1986

APPEARANCES

FOR THE PLAINTIFF:	Pat Malloy & Ron Bernbaum Attorneys at Law 3545 E. 51st St. Tulsa, Oklahoma
FOR THE DEFENDANTS:	Phillip McGowan Attorney at Law Denver Building Tulsa, Oklahoma
	Ms. Doris Fransein Asst. District Attorney Tulsa County Courthouse Tulsa, Oklahoma
REPORTED BY:	Ms. Tonya M. Bowen Cert. Shorthand Reporter Tulsa County Courthouse Tulsa, Oklahoma

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PROCEEDINGS

* * *

[p. 3] (the following proceedings were held in chambers)

THE COURT: This is Case Number CJ 85-4803, Monica McCabe, plaintiff, versus Board of County Commissioners, and other defendants.

This matter comes on now pursuant to the plaintiff's Motion for Summary Judgment.

The record should reflect that Mr. Bernbaum and Mr. Malloy are present here on behalf of the plaintiff. Counsel for everybody else is here too.

The record should reflect that I had received from Counsel the additional authorities that I had requested at the last hearing, I believe on the 24th of October. I requested Counsel to submit to me additional authorities in regard to the issue of the discrepency in the legal description contained in the previous proceedings in Case Number CJ 78-2116. I have received those and have had an opportunity to review those. And also to review the authorities and briefs previously submitted on the issues presented by the plaintiffs on the Motion for Summary Judgment.

It appears to the Court that having reviewed those authorities and the arguments of Counsel, that at this time the plaintiff's Motion for Summary Judgment should

be overruled. My feeling at this time is that having reviewed the matters [p. 4] presented to the Court in regard to the question of whether the judgment of December 4th, 1978 is, in fact, void. I have concluded that it is not. It appeared from the cases that I've looked at that it is incumbent upon the plaintiff to show, in order to attack that judgment, that the judgment is void. And must show that the Court at that time either lacked jurisdiction of the party or subject matter, or lacked jurisdiction to render the decision that it rendered at that time.

I have concluded in looking at the judgment rendered and also the authorities that have been cited by Counsel that the judgment is, in fact, not void. That being the only basis on which the judgment could be attacked, it's my conclusion that the plaintiff's Motion for Summary Judgment must fail.

We have also the defendant's Motion to Dismiss, which I have not really addressed since that was not formally argued previously. I don't know what affect the Court's finding in regard to the Motion for Summary Judgment has on the defendant's Motion to Dismiss.

MS. FRANSEIN: Is this the Board of County Commissioners?

THE COURT: That's correct.

MS. FRANSEIN: For the record, would you go ahead and rule. The Board of County Commissioners and the County [p. 5] Treasurer has filed disclaimers in this case. We have no interests whatsoever in this case. Also

that we are not the proper parties to be sued in a situation as in this. And we don't have material interest in their controversy. And therefore, ask that we be dismissed. And if the Court would go ahead and rule, I imagine the plaintiffs may very well appeal your decision, and –.

THE COURT: Well, I don't know that they can actually appeal. Rule 13 provides, and I think that the alternative to that is finding, in fact, that Mr. Pearce is entitled to judgment based on the ruling that the judgment is not void-upon my finding that it's not void. I also did, of course, review the issues in regard to the misdescription, and I have not concluded in looking at that and the cases cited that the property is not identifiable. My feeling is that it is, and it appears to be a typographical error. It being sufficiently described, even though there is a mistake in that description, I could not conclude that the judgment should be set aside on that basis.

MR. MALLOY: Now, I wanted to address that particular point, if I may. That we are familiar – The Court has read the cases cited by Counsel with reference to the description. Are you saying in essence that your decision relative to the description error, that the cases that were submitted by Counsel is the predicate for that ruling in that face of it?

[p. 6] THE COURT: No, sir. I looked at the authorities that you – Actually it was a letter from Mrs. McCabe rather than a letter from you all. I don't know why she sent that, I really was a little bit surprised when I saw that she had sent this. I don't know if she prepared it or not. Did she?

MR. MALLOY: I didn't prepare it.

THE COURT: Mr. Bernbaum, the letter from her filed November the 7th, was that prepared by her or you?

MR. BERNBAUM: Prepared by both of us.

THE COURT: In any event, that is not the only basis for it. I did review those authorities in reaching my conclusion. But, I think the cases indicate that if the property can be sufficiently identified, that simply because there's an error in the description is not sufficient.

MR. MALLOY: Okay.

THE COURT: To make a ruling that the judgment, based on that description, is void.

MR. MALLOY: You were aware of the fact, the reason I'm asking you about these citations, none of these cases were cited to you relative to descriptions had anything to do with a missed description of this nature. In all of those cases they were talking about interpretation of deeds and –.

THE COURT: I was aware of that.

MR. MALLOY: And you didn't get into the constitutional question of whether or not someone can possibly get notice [p. 7] when the description is, in part, four miles away. In other words, the cases they cited really, in our opinion, were not pertinent to the issue here with respect to a description such as this. Which is not only, as we said to you in the argument and in the briefs, not only inconsistent, but contradictory in a notice in the complaint petition, and in the notice and in the judgment.

Those cases, in our judgement, cannot possibly be pertinent to the circumstances of this case unless – I was, in the event we do have to appeal this thing, wanting to find out if there's something else other than those cases that you made that ruling that this description in this notice was not, in fact, a deprivation of due process of law.

THE COURT: I think I understand that, sir. I think the real question here is whether a person could fairly ascertain what the property is from looking at the description.

MR. MALLOY: Okay.

THE COURT: I think looking at that description that you can tell what the property is.

MR. MALLOY: Okay.

THE COURT: I think it does, in fact, adequately identify what the property is. And that I thought was the issue that was presented. So, I understand that the cases that they cite had to do with deeds rather than questions of descriptions in regard to lawsuits that were pertaining to notice.

[p. 8] MR. MALLOY: And notices and due process.

THE COURT: I understand that.

MR. MALLOY: Okay, all right.

THE COURT: So, I am aware of the distinction and that did not go unnoticed.

MR. McGOWAN: You do have one more pending motion that is on our Motion for –.

THE COURT: I think there was. I looked back through the file and realized that this had been filed. I wasn't sure whether it had been ruled on.

MR. McGOWAN: No, Your Honor, it has not.

THE COURT: Can I go back to one issue here that I don't think–?

MR. McGOWAN: Yes, you may.

THE COURT: In regard to the question of Plaintiff's Motion for Summary Judgment. The overruling of your motion is not grounds for appeal because you can't appeal the overruling on Motion for Summary Judgment. In other words, I think the issue has been fairly presented by you all, and simply to me are matters of law. And I think this is something you addressed previously and agreed to tie in and address these issues. In the first instance, to prevent having to go forward with any evidence in the event that I found that the judgement was not void, that it was valid. So, having found that your motion should be overruled, I think as a matter of law pursuant [p. 9] to Rule 13, I then find that Mr. Pearce, the defendant, is, in fact, entitled to judgment under Rule 13. Having made that finding, it would make it an appealable order.

MR. MALLOY: Did You –?

MR. BERNBAUM: Not necessarily, I would like to call something to the Court's attention. The decision that the Court has made today does not end the case because, and I'm sure the Court is aware, that Monica McCabe is claiming title to a 20-acre tract, and this judgment

involves an acreage of less than 20 acres. So, there are still issues involved here.

THE COURT: I'm just saying for purpose of determining whether you have an appealable order, my overruling your motion is not appealable regardless of whether you take the position of it is a final judgment or not. So, I –.

MR. MALLOY: I'm glad Ron mentioned that. That does create, I think, a factual issue still in this case which is not determined by the Motion for Summary Judgment with respect to the void judgment. That's because the judgment, whether it be void or valid, does not effect the five acres.

Isn't that the point you're talking about, Ron?

MR. BERNBAUM: That's correct.

MR. McGOWAN: However, let me point this out though. As to Mr. Pelizzoni and Lewis and as to P&L, our Motion for Summary Judgment will be predicated upon this ruling because [p. 10] in point of fact, we never claimed an interest in anything other than the north half lying north of Bird Creek. Never did we put a well any place other than that portion of the property lying north of Bird Creek.

THE COURT: I assume that they are referring to Pearce as –.

MR. McGOWAN: Listen, I don't represent Pearce, Your Honor, he may have other problems in this case. He may have problems concerning the judgment. That is not my problem. My problem is, or the issue that confronts this Court as far as my clients are concerned is we are

sued for converting oil and trespassing upon the property that Your Honor has just found, in fact, was owned by Pearce at the time the leases were given by virtue of your Court's upholding the validity of the 1978 Quiet Title Judgement. Now, we can bring this to an appealable issue on that basis without any difficulty at all.

THE COURT: I think the question that has to be addressed is whether the other five acres is involved as far as your clients against Lewis and Pelizzoni.

MR. BERNBAUM: It is.

MR. McGOWAN: How is that possible?

MR. BERNBAUM: I'll tell you. Because if, in fact, the Judge's decision stands, and it's not appealable, then your clients became co-tenants with my clients. And you have co-tenant liability.

[p. 11] MR. McGOWAN: Mr. Bernbaum, we never took a lease on the other five acres.

THE COURT: Well, I think the only thing I can do as far as this is concerned is determine that your Motion for Summary Judgment be overruled.

And your motion should be granted on behalf of Lewis and Pelizzoni.

As far as Lewis Pearce is concerned, he's involved in this still. So, neither here nor there as far as he's concerned.

I assume it will have some effect if he were to urge a Motion for Summary Judgment.

MR. McGOWAN: Somebody named Hampton.

THE COURT: He was in the previous proceeding.

MR. BERNBAUM: Your Honor is saying that the Motion for Summary Judgment filed by Pelizzoni and Lewis is the – Is that Summary Judgment appealable?

MR. McGOWAN: Absolutely correct.

MR. MALLOY: Is that what you're saying?

THE COURT: I don't think that's my decision to make. I'm saying you cannot appeal from the overruling of a Motion for Summary Judgment. You can if a Motion for Summary Judgment is sustained, and it's a final judgment.

MR. MALLOY: Don't you agree with this? If you get an order which would logically follow from your sustaining of their Motion for Summary Judgment, then a judgment on that [p. 12] certainly is an appealable order.

MR. BERNBAUM: I think it is.

MR. McGOWAN: Let me clarify one thing. The Court is at this time sustaining the Motion for Summary Judgment filed on behalf of Pellizoni and Lewis? Is that what you are saying?

THE COURT: I hope that's what I just stated. I believe that's what I just stated.

Now, as far as your Motion to Dismiss is concerned.

MS. FRANSEIN: Yes, Your Honor. We have no interest whatsoever. We have disclaimed interest in this property. We are not necessary or proper parties to be sued in this matter.

THE COURT: Mr. Bernbaum, in regard to your claims against Ms. Fransein's clients, is there any claim other than the Quiet Title against them?

MR. BERNBAUM: The judgment and the – No, I think it would be for vacation of judgment in Quiet Title. There's no claim besides that that I'm aware of.

THE COURT: I think, based on the ruling that I've just made, that any participation you may have had in the previous proceeding, that is in the 1978 case, is not void. I think it relieves you of any liability for that. I don't know if you call it sustaining a Motion to Dismiss or finding that you're entitled to judgment as a matter of law.

[p. 13] MR. BERNBAUM: I'd like the record to reflect that the plaintiff takes exception to all the rulings that the Court makes today.

THE COURT: I don't think you formally have to do that.

MR. BERNBAUM: I want to do it anyway.

MR. MCGOWAN: Don't blame you.

THE COURT: Off the record.

(whereupon discussion was had off the record)

THE COURT: Let the record reflect that as far as the defendant's Motion to Dismiss is concerned that having considered other items outside the pleadings presented, that pursuant to the Section 2012 of the Pleading Code, I will treat as a Motion for Summary Judgment. Particularly because it involves issues of law that the Court considered in regard to the plaintiff's Motion for Summary Judgment.

The Court further finds that the defendant's Motion being treated as a Motion for Summary Judgment be sustained and judgment should be entered in favor of the Board of County Commissioners and County Treasurer.

CERTIFICATE

STATE OF OKLAHOMA,)
) ss:
COUNTY OF TULSA.)

I, TONYA M. BOWEN, a Certified Shorthand Reporter in and for the State of Oklahoma do hereby certify that the foregoing is a true and correct record of my notes taken in Case Number CJ 85-4803, on the 14th day of November, 1986.

I further certify that I am not related to nor Attorney for either of said parties, nor otherwise interested in the outcome of said cause.

WITNESS MY HAND AND SEAL this 24th day of November, 1986.

/s/ Tonya M. Bowen
Tonya M. Bowen, CSR